

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

**LORIANN COLLINS AND
DAVID COLLINS,
Plaintiffs,**

v.

**DAVID BROWN UNION PUMPS CO.
AND L.B. SMITH, INC.,
Defendants.**

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**CIVIL ACTION
NO. 06-CV-3754**

MEMORANDUM AND ORDER

Tucker, J.

April __, 2007

Presently before the Court is Plaintiffs' Motion to Remand (Doc. 5). For the reasons set forth below, upon consideration of Plaintiffs' Motion, Defendant David Brown Union Pumps Co.'s Response (Doc. 6), Defendant L.B. Smith, Inc.'s Response (Doc. 10), and Plaintiffs' Reply (Doc. 8), this Court will grant Plaintiffs' Motion and remand this case to the Court of Common Pleas for Philadelphia County.

I. BACKGROUND

On or around June 19, 2006, Plaintiffs Loriann Collins and David Collins filed a complaint in the Court of Common Pleas for Philadelphia County against Defendants David Brown Union Pumps Company ("Brown Co.") and L.B. Smith, Inc. ("Smith, Inc."), alleging negligence, strict liability, breach of warranties, and loss of consortium. Specifically, Plaintiffs claim that, while at work, Ms. Collins injured her hand on a peanut butter pump that Plaintiffs allege was manufactured, designed, marketed, promoted, sold, distributed and/or otherwise supplied by Defendants. Additionally, as proof that Smith, Inc. supplied the pump to Ms.

Collin's employer, Plaintiffs cite a shipping memorandum dated September 13, 1976, which suggest that Smith, Inc. shipped a peanut butter pump with a base and cylinder to Ms. Collin's employer, H.B. Reese Candy Co. Plaintiffs further maintain that Smith, Inc. sold, supplied or introduced into the stream of commerce the peanut butter pump.

On August 23, 2006, Brown Co. filed a Notice of Removal with this Court under 28 U.S.C. § 1441 (Doc. 1). In the Notice of Removal, Brown Co. asserts that diversity of citizenship exists between the parties because Brown Co. is a Michigan corporation with its principal place of business in that state, and that Plaintiffs are citizens of Pennsylvania. However, Brown Co. alleges that although Smith, Inc. is incorporated in Pennsylvania and has a principal place of business in this state, that did not defeat diversity because Smith, Inc. was fraudulently joined. Indeed, Brown Co. maintains that Smith, Inc. only made and supplied the base on which the pump was installed and not the pump itself. Therefore, Brown Co. argues that Smith, Inc. has no connection to the pump itself, and that Plaintiffs have no reasonable basis or colorable claim upon which Smith, Inc. could be found liable.

On September 13, 2006, Plaintiffs filed a Motion to Remand to the Court of Common Pleas for Philadelphia County pursuant to 28 U.S.C. § 1447(c) (Doc. 5).

II. DISCUSSION

The crux of Plaintiffs' Motion is that removal is improper because (1) Smith, Inc. did not affirmatively consent to removal in this case and (2) there exists no facts to show Smith, Inc. was fraudulently joined in this matter. Plaintiffs also argue that they should be awarded attorneys' fees because Brown Co. had no objectively reasonable basis for removing this case to federal district court.

The Court will review each claim in turn.

A. Subject Matter Jurisdiction

Plaintiffs' Motion was filed pursuant to 28 U.S.C. § 1447(c) which provides, in relevant part, that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). As this case presents no federal question, Defendant Brown Co. sought to remove this matter under the diversity statute, 28 U.S.C. § 1332(a)(1).

It is axiomatic that the diversity statute requires complete diversity as to all parties. Here, Plaintiffs have alleged, and Defendants have not argued otherwise, that both Plaintiffs and Smith, Inc. share citizenship in Pennsylvania. Accordingly, to avoid remand, Defendants must demonstrate that the non-diverse party (Smith, Inc.) was fraudulently joined in the matter. Batoff v. State Farm Ins. Co., 977 F.2d 851 (3d Cir. 1992).

The Court finds that Defendants cannot make this showing.

B. Fraudulent Joinder

To establish fraudulent joinder, the removing party has a "heavy burden of persuasion." Batoff, 977 F.2d at 851. The Third Circuit has held that "joinder is fraudulent where there is no colorable ground supporting the claim against the joined defendant, or no real intention in good faith to prosecute the action against the defendants or seek a joint judgment." Id. (citing Boyer v. Snap-On Tools Corp., 913 F.2d 108, 111 (3d Cir. 1990)); In re Briscoe, 448 F.3d 201, 216 (3d Cir. 2006). A ground that is not colorable is one that is wholly insubstantial and frivolous. Batoff, 977 F.2d at 852. "Even a possibility that a state court would find that the complaint states a cause of action against" a defendant is enough for the federal court to remand a matter to

state court. Id. at 851. As such, it is conceivable that a party may not be fraudulently joined, but that the claim against the party is ultimately dismissed by the state court for failure to state a claim. Id. at 852. If an intricate analysis of state law is required to determine dismissal, then the claim is not so insubstantial that it may be disregarded for purposes of diversity jurisdiction. Id. at 853. Moreover, the removal statutes are to be “strictly construed against removal and all doubts should be resolved in favor of remand.” Id. at 852.

In making its determination, a court must focus on the plaintiff’s complaint at the time the petition for removal was filed and assume as true all factual allegations made in the complaint. Anderson v. Philadelphia Suburban Dev’t Corp., 322 F. Supp. 2d 582, 585 (E.D. Pa. 2004) (citing Batoff, 977 F.2d at 851-852). Nonetheless, a court may “pierce the pleadings” and look beyond the plaintiffs’ complaint to examine the underlying facts. Abels v. State Farm Fire & Cas. Co., 770 F.2d 26, 32 (3d Cir. 1985). Though, this piercing should be limited in scope as it is not the province of the district court to do a deeper 12(b)(6) analysis. Boyer, 913 F.2d at 111; Baum v. NGK Metals, Corp., 155 F. Supp. 2d 376, 380 (E.D. Pa. 2001).

Here, Plaintiffs contend that Smith, Inc. supplied the pump to Ms. Collins’ employer based on a shipping memorandum dated September 13, 1976. That memorandum indicates that Smith, Inc. shipped a peanut butter pump with base and cylinder to H.B. Reese Candy Company. On that basis, Plaintiffs argue that Smith, Inc. is liable for introducing the pump into the stream of commerce under Restatement (Second) of Torts § 402A. Plaintiffs further assert that Smith, Inc. is strictly liable as a supplier in the product’s chain of distribution and that Smith, Inc. was negligent through its supply of a product that caused physical harm pursuant to Restatement (Second) of Torts § 388.

Defendants have responded that Smith, Inc. only made the base for the pump, installed the pump on the base and then returned the final product to Transmission Engineering Company, Inc. Therefore, Defendants argue that Smith, Inc. did not place the pump into the stream of commerce, nor did it supply or install the final product for Ms. Collin's employer. Defendant Smith, Inc. further suggests that Plaintiffs have not properly applied the law or the Restatement to the facts of this case. Rather, Smith, Inc. argues that because the base is a component part of the pump, Smith, Inc. should only be liable if the base itself is defective or if Smith, Inc. "substantially participated" in the design of the final product. Because Plaintiffs do not allege that the base was defective, Smith, Inc. contends that Plaintiffs have not stated a cognizable claim against it. The Court, however, does not agree.

Ultimately, Plaintiffs have stated a colorable claim against Smith, Inc. The shipping memorandum suggests that Smith, Inc. played a role in the supply of the pump and the base to the H.B. Reese Candy Company, where Ms. Collins was injured. Although Smith, Inc. disputes that interpretation of the memorandum, Plaintiffs maintain that even if Smith, Inc. only supplied the base it still may be found liable under Pennsylvania law. It is possible that a state court may make a finding consistent with the plain meaning of the shipping memorandum or that Smith, Inc. may be found liable for the supply of at least the base to the pump. That said, a decision on fraudulent joinder does not mandate the kind of "intricate analysis" that is required of a motion to dismiss. See Batoff, 977 F.2d at 853. As such, this decision does not express an opinion on the merits of Plaintiffs' claims. Rather, this Court only holds that Plaintiffs' claims against Smith, Inc. are not so insubstantial as to show fraudulent joinder.

Accordingly, this Court does not have jurisdiction over this case.¹

C. Attorney's Fees

Plaintiffs have also requested attorneys' fees pursuant to 28 U.S.C. § 1447(c) which states in pertinent part that "an order remanding the case may require payment of just costs and any actual expenses, including attorney's fees, incurred as a result of removal." 28 U.S.C. § 1447(c). However, this Court has discretion to impose such fees, and will generally only do so where "the issue of non-removability is obvious or where a defendant did not act in good faith in removing the case." Anderson, 322 F. Supp. 2d at 586.

There is nothing in the record here to suggest that Defendant Brown Co. has acted in bad faith. Moreover, non-removability is not so obvious as to warrant attorneys' fees. The Court, therefore, will not order payment of attorneys' fees.

III. CONCLUSION

This Court finds that Defendant Brown Co. has failed to show that Plaintiffs fraudulently joined Defendant Smith, Inc. in this matter. The parties, therefore, lack complete diversity because Plaintiffs and Smith, Inc. are both citizens of the Commonwealth of Pennsylvania. Accordingly, this Court lacks jurisdiction over this matter under 28 U.S.C. § 1332(a)(1). The Court, therefore, grants Plaintiffs' Motion to Remand under 28 U.S.C. § 1447(c).²

An appropriate Order follows.

¹ Plaintiffs also argue that this Court must grant the motion to remand because Smith, Inc. failed to properly join the Notice of Removal. Defendants respond that not only did Smith, Inc. consent through an email, but that consent was not required because Smith, Inc. was fraudulently joined. The issue of consent to removal, however, is rendered moot because, in the absence of fraudulent joinder, there is not complete diversity among the parties.

² The Court also dismisses Plaintiffs' Motion to Stay Federal Proceeding as moot.

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AND L.B. SMITH, INC.,
Defendants.**

ORDER

AND NOW, this ____ day of April 2007, upon consideration of Plaintiffs' Motion to Remand (Doc. 5), Defendant David Brown Union Pumps Co.'s Response (Doc. 6), Defendant L.B. Smith, Inc.'s Response (Doc. 10), and Plaintiffs' Reply (Doc. 8), **IT IS HEREBY ORDERED** and **DECREED** that the Motion is **GRANTED**. This case shall be remanded back to the Court of Common Pleas for Philadelphia County.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Stay Federal Proceedings (Doc. 4) is **DISMISSED** as **MOOT**.

The Clerk of the Court shall return the record in this case to the state court and mark this action as **CLOSED** for statistical purposes.

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.